U.S. Department of Justice

Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 8 2001

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, ATI International, is an Oregon corporation that claims to be an exporter of commodity items to the Russian Far East and a subsidiary of TOO "TOR," located in Russia. It seeks to employ the beneficiary as the company's product manager/vice president and, therefore, endeavors to classify him as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director of the Nebraska Service Center denied the petition because the petitioner failed to establish that the beneficiary is currently and will continue to be employed in a primarily executive capacity.

On appeal, counsel submits a brief. The petitioner submits a copy of a 1998 W-2, Wage and Earning Statement, for a claimed employee, Evgeny Shonya.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The issue to be examined in this proceeding is whether the beneficiary is currently and will continue to be employed in a primarily managerial or executive capacity. It is noted that the beneficiary has been employed by the petitioner in H-1B status since approximately July 1997.

The director denied the petition because the company's organizational structure led to the conclusion that the beneficiary would perform the day-to-day operations of the company. According

to the corporate structure presented by the petitioner, the company employed only managerial employees, so the director found that although the beneficiary performed important tasks on behalf of the petitioner, these tasks were, nevertheless, routine day-to-day business activities.

On appeal, counsel presents evidence not previously submitted into the record, which shows that the petitioner employs an individual, [redacted] who performs the day-to-day activities. Counsel maintains that this evidence shows that the Service was incorrect when it concluded that the petitioner did not employ any non-managerial employees. Counsel argues that the beneficiary's duties are executive in nature because the beneficiary negotiates settlements; locates and selects merchandise such as fruit juices, soft drinks and poultry; negotiates with customers; negotiates with freight handlers; establishes goals and policies; exercises wide latitude in discretionary decision-making; and receives only general supervision. Counsel also argues that the beneficiary's duties are managerial in nature because the beneficiary directs product development, directs the work of the accounting/traffic managers, supervises workers engaged in receiving and shipping freight, functions at a senior level within the organization, and directs the day-to-day operations of the product development activities.

Counsel's arguments are not persuasive. The Service cannot find that the duties of the beneficiary meet either the definition of managerial capacity or executive capacity because the petitioner has presented evidence on appeal that contradicts evidence previously entered into the record.

First, the petitioner, on appeal, presents a copy of a 1998 W-2, Wage and Tax Statement, for [redacted]. [redacted] is the individual who counsel argues relieves the beneficiary from performing any nonqualifying duties. In its initial I-140 petition, the petitioner claimed that it employed only three individuals; therefore [redacted] can only be the accounting manager/international traffic manager, as Sergey Kiselov acts as the export manager/president, and the beneficiary acts as the product manager/vice president. On appeal, counsel states the following about the beneficiary's role within the company:

> The beneficiary generally reviews the day-to-day functions performed by [redacted]; he therefore performs managerial supervisory functions. Moreover, these functions are pivotal to the operation of the company, and the review of invoices and bills of lading is managerial in nature. These invoices and bills of lading affect financial transactions that are worth millions of dollars.

The job description for accounting manager/international traffic manager ([redacted] apparent position) did not state that this

position was supervised by the beneficiary, or was responsible for performing the day-to-day functions. Additionally, the beneficiary's job description did not state that the beneficiary supervised the accounting manager/international traffic manager or any other employee, or that he reviewed invoices and bills of lading. Only counsel, on appeal, claims that the beneficiary supervises an employee and performs tasks not previously mentioned by the petitioner.

Pursuant to 8 C.F.R. 204.5(j)(5), a petitioner must submit a job offer in the form of a statement, which clearly describes the duties to be performed by the alien. The Service cannot find that the beneficiary's job description clearly states the duties to be performed by him in the role of product manager/vice president because evidence submitted in the initial I-140 petition contradicts evidence submitted on appeal.

Second, a copy of the petitioner's 1998 corporate income tax return shows that the petitioner paid $26,000 in wages (Line 13) in the 1998 tax year; however, [redacted] W-2, earnings and tax statement shows that the petitioner paid him $39,000 in wages during the 1998 tax year. Counsel has not explained why the amount of [redacted] earnings in 1998 was greater than the reported wages paid on the petitioner's 1998 corporate income tax return.

Finally, even if [redacted] is not the accounting manager/international traffic manager, but rather a fourth employee, the petitioner failed to explain why it never included Mr. Shonya's name, title or job description in its organizational structure, and only claimed that it employed three individuals, not four.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988).

The evidence in the record has not clearly established that the beneficiary works in a primarily executive or managerial capacity. In the initial I-140 petition, the petitioner claimed that it employed only managerial employees; however, on appeal, counsel claims that the petitioner employs an individual in a non-managerial position who performs nonqualifying duties. The job descriptions presented in the initial I-140 petition also contradict claims made by counsel on appeal. Such contradictory evidence does not lead to a conclusion that the beneficiary works in a primarily executive or managerial capacity. Therefore, the director's denial of the petition is affirmed.

Beyond the decision of the director, the record does not support a finding that a qualifying relationship exists between the U.S. and

foreign entities.

The petitioner claims that a qualifying relationship exists between [redacted] and the petitioner because a stock certificate shows that [redacted] the foreign entity, owns 50% of the shares in the petitioner. Another stock certificate shows that the remaining 50% of the petitioner's shares are owned by [redacted]"

8 C.F.R. 204.5(j)(2) states, in pertinent part:

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The definition of a subsidiary includes a provision for a parent company that own 50% of a 50-50 joint venture. There are no provisions in statute, regulation, or case law that allow for the recognition of veto power or negative control in other than a 50-50 joint venture.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. Control may be *de jure* by reason of ownership of 51% of outstanding stocks of the other entity, or it may be *de facto* by reason of control of voting shares through partial ownership and by possession of proxy votes. Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982).

The petitioner did not submit any evidence, such as agreements relating to the voting of shares, to show that the foreign entity, [redacted]" has control over the petitioner. Control over the petitioner is a critical element because the foreign entity only has 50% ownership of the petitioner. As the record lacks evidence of control, the Service does not find that a qualifying relationship exists between the U.S. and foreign entities.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.